



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 28, 2011

Mr. Adam D. Courtin
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2011-04168

Dear Mr. Courtin:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 412481.

The New Caney Independent School District (the "district"), which you represent, received a request from an investigator with the Texas Education Agency ("TEA") for six categories of information pertaining to a named former employee. You state the district has released most of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable" information is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted, among other things, redacted and unredacted education records for our review. Because our office is prohibited from reviewing the submitted education records to determine the applicability of FERPA, we will not address FERPA with respect to those records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34

¹A copy of this letter may be found on the attorney general's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education record.²

We note portions of the submitted information, which we have marked, are not responsive to the instant request because they do not pertain to the named former employee. The district need not release nonresponsive information in response to this request, and this ruling will not address that information.

Next, we note that you have redacted the names of certain district employees from the submitted information. You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any such information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested" or representative sample), .302.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses section 261.201 of the Family Code, which provides in part as follows:

(a) [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You explain Exhibits C and D relate to an investigation by the district's administration into the alleged abuse or neglect of a child. You contend that

²In the future, if the district does obtain consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

Exhibits C and D are confidential because they constitute information used or developed in an investigation under chapter 261 of the Family Code. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code). However, we note the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). You also contend Exhibits C and D consist of a report of alleged or suspected child abuse made to the Child Protective Services Division of the Texas Department of Family and Protective Services (“CPS”) under chapter 261 of the Family Code. Although the submitted information reflects the incident at issue was reported to CPS, we note Exhibits C and D consist of witness statements and notification forms collected or generated by the district for its administrative investigation. You do not explain, and we cannot discern, whether this information was used by CPS in an investigation under chapter 261. *See id.* § 261.201(a)(2). Thus, we conclude you have failed to demonstrate that Exhibit C or Exhibit D constitute a report of alleged or suspected abuse or neglect made under chapter 261 or that this information was used or developed in an investigation under chapter 261. Consequently, the district may not withhold Exhibits C or D under section 552.101 on the basis of section 261.201.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. The Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See Open Records Decision No. 643* (1996). In *Open Records Decision No. 643*, we determined a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4.

We note the information we have marked consists of written reprimands from a principal to the named former employee. Upon review, we find these written reprimands constitute evaluations for the purposes of section 21.355 of the Education Code. Thus, to the extent the former employee held a teaching certificate and was engaged in the process of teaching at the time of the written reprimands, the information we have marked is confidential under section 21.355 of the Education Code, and must be withheld under section 552.101 of the Government Code. To the extent this employee did not hold the requisite certificate, or was not engaged in the process of teaching, the information we have marked is not confidential under section 21.355, and may not be withheld under section 552.101.

You contend that portions of Exhibit D are excepted under section 552.135 of the Government Code, which provides the following:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under this exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Additionally, we note that individuals who provide information in the course of an investigation, but do not make the initial report are not informants for the purposes of section 552.135 of the Government Code. We note that section 552.135 protects an informer's identity, but it does not generally encompass protection for witnesses or witness statements. You state that portions of the remaining information reveal the identities of individuals who reported possible violations of law to the district. Based on your representations and our review of the information, we conclude the district must withhold the information we have marked under section 552.135 of the Government Code. However, the district has failed to demonstrate how any portion of the remaining information at issue reveals the identity of an informer for section 552.135 purposes. Accordingly, none of the remaining information may be withheld on that basis.

As previously noted, the requestor is a staff investigator with the TEA. The TEA's request states it is seeking this information under the authority provided to the State Board for Educator Certification ("SBEC") by section 249.14 of title 19 of the Texas Administrative Code. Chapter 249 of title 19 of the Texas Administrative Code governs disciplinary proceedings, sanctions, and contested cases involving SBEC. *See* 19 T.A.C. § 249.4. Section 249.14 provides in relevant part:

(a) [TEA] staff may obtain and investigate information concerning alleged improper conduct by an educator, applicant, examinee, or other person subject to this chapter that would warrant the [SBEC] denying relief to or taking disciplinary action against the person or certificate.

...

(c) The TEA staff may also obtain and act on other information providing grounds for investigation and possible action under this chapter.

19 T.A.C. § 249.14(a), (c). In this instance, the TEA requestor states he is investigating alleged improper conduct by or criminal history information regarding the named former employee and needs to review the requested records to determine whether disciplinary action related to the employee's certification is warranted. Thus, we find the information at issue

is generally subject to the right of access afforded to the TEA under section 249.14. However, because some of the requested information is specifically protected from public disclosure by section 21.355 of the Education Code and section 552.135 of the Government Code, we find that there is a conflict between these statutes and the right of access afforded to TEA investigators under section 249.14.

Where general and specific provisions are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence the legislature intended the general provision to prevail. *See* Gov't Code § 311.026(b); *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones). Although section 249.14 generally allows the TEA access to information relating to suspected misconduct on the part of an educator, section 21.355 of the Education Code specifically protects educator evaluations, and section 552.135 of the Government Code specifically protects the identity of certain individuals who report a possible violation of law to a school district. These sections specifically permit release to certain parties and in certain circumstances that do not include the TEA investigator's request in this instance. Thus, we find section 21.355 and section 552.135 prevail over the general TEA right of access. We therefore conclude, notwithstanding the provisions of section 249.14, the district must withhold the information we have marked under section 552.101 in conjunction with section 21.355 and the information we have marked under section 552.135.

You also assert that portions of the remaining information are excepted from disclosure under section 552.101 in conjunction with common-law privacy.³ Additionally, we note you have redacted the named former employee's home address under section 552.117 of the Government Code pursuant to section 552.024 of the Government Code.⁴ However, these sections are general exceptions to disclosure that do not have their own release provisions. Therefore, TEA has a right of access to the remaining information, including the home address you have redacted and the redacted names of employees, pursuant to section 249.14. *See* Open Records Decision No. 525 (1989) (exceptions to disclosure do not apply to information made public by other statutes).

³Section 552.101 encompasses common-law privacy, which protects information if: (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976).

⁴Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). Section 552.024(c)(2) of the Government Code authorizes a governmental body, without the necessity of requesting an attorney general decision, to redact the personal information of an employee, official, former employee, or former official who has chosen not to allow public access to her personal information. *See id.* § 552.024(c)(2).

In summary, this ruling does not address the applicability of FERPA to the submitted information. To the extent the former employee held a teaching certificate and was engaged in the process of teaching at the time of the written reprimands we have marked, the district must withhold the reprimands under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information we have marked under section 552.135 of the Government Code. The district must release the remaining information, including the redacted employee names and home address, to the TEA investigator pursuant to section 249.14 of Title 19 of the Texas Administrative Code.⁵

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 412481

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵Because TEA has a right of access to certain information in the submitted documents that otherwise would be excepted from release under the Act, the district must again seek a decision from this office if it receives a request for this information from a different requestor without such a right of access.